88-853 (1)
No.

Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

BMT COMMODITY CORP. and DELCA DISTRIBUTORS, INC.,

Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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39 pp

QUESTIONS PRESENTED

1. In a case of first impression arising under the federal antidumping law, did a panel of the Court of Appeals err when it affirmed the reviewing court's use of inferences and assumptions to supply a rationale wholly missing from the agency's explanation of the applicable legal standard?

2. Did the panel of the Court of Appeals err when it affirmed the lower court's conclusion that the agency's determination was supported by substantial evidence on the record, where the agency *conceded* that its determination (a) rested on evidence that contains a blatant and fatal error and (b) ignored evidence of record which the reviewing court held to be directly relevant to the crucial issue?

PARTIES TO THE PROCEEDINGS

The caption of the case contains the name of all parties in the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of International Trade,* except that Codfish Corporation** appeared as Defendant-Intervenor in the U.S. Court of International Trade.

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* Petitioner BMT Commodity Corp. is a privately held corporation whose shareholders are private individuals. Delca Distributors, Inc. is a wholly-owned subsidiary of BMT. Neither corporation has any publicly held affiliates.

** Upon information and belief, Codfish Corporation is a privately held corporation.

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No.

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Petitioners,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners BMT Commodity Corp. and Delca Distributors, Inc. (hereinafter collectively referred to as "BMT"), respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered on August 9, 1988.

OPINIONS BELOW

The opinion of a panel of the Court of Appeals is set forth as Appendix A and is reported at 852 F.2d 1285. The opinions of the Court of International Trade are set forth in Appendices B and C and are reported at 674 F. Supp. 868 and 667 F. Supp. 880, respectively. The determination of the United States International Trade Commission is set forth in Appendix D and is published as USITC Publication No. 1711.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1988. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 516A(b)(1)(B), 19 U.S.C. § 1516a(b)(1)(B), provides as follows:

> Judicial review in countervailing duty and antidumping duty proceedings
>
> (b) Standards of review.—
>
> (1) Remedy.—The court shall hold unlawful any determination, finding, or conclusion found—
>
> . . .
>
> (B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence

> on the record, or otherwise not in accordance with law.

Section 735(b)(1)(B) of the Tariff Act of 1930, 19 U.S.C. § 1673d(b)(1)(B) (prior to 1984 amendment), provides as follows:

> Final determinations
>
> (b) Final determination by Commission.—
>
> (1) In general.—The Commission shall make a final determination of whether—
>
> . . .
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section.

STATEMENT OF THE CASE

This case arises from a determination of the U.S. International Trade Commission (the "Commission") in an antidumping "injury" proceeding. In July 1985, the Commission determined that the establishment of an industry in the United States was materially retarded by reason of imports of certain Canadian fish products which the U.S. Department of Commerce had found to be sold at less-than-fair-value. *Certain Dried Salted Codfish from Canada,* Inv. No. 731-TA-199 (Final), USITC Pub. 1711 (July 1985) [Appendix D].

BMT sought judicial review of the Commission's determination. On July 22, 1987, the U.S. Court of International Trade entered a judgment upholding the Commission's determination. On November 22, 1987, BMT's motion for rehearing was denied. *BMT Commodity Corp. v. United States*, 11 CIT____, 667 F. Supp. 880 (1987) [Appendix C], *rehearing denied*, 11 CIT____, 674 F. Supp. 868 (1987) [Appendix B].

BMT appealed to the U.S. Court of Appeals for the Federal Circuit, which affirmed the lower court's judgment on the basis of the lower court's opinions. *BMT Commodity Corp. v. United States*, 852 F.2d 1285 (Fed. Cir. 1988) [Appendix A]. This petition follows.

The Issues Presented

The first issue presented by this petition is whether the panel of the Court of Appeals correctly applied this Court's decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67 (1983), and similar cases. It is petitioner's position that the lower court improperly reformulated the different opinions of the individual Commissioners and admittedly employed the liberal use of assumptions and inferences to supply its own rationale for the agency decision.

The second issue presented by this petition is whether the panel of the Court of Appeals erred in affirming the Commission's determination notwithstanding the Commission's admission that (i) the sole evidence which the Commissioners considered on the dispositive issue contains a blatant, obvious and critical error, and (ii) the Commissioners failed to consider all the evidence of record which the lower court held to be probative of the issue.

Overview

The federal courts have not previously considered the legal standard for determining whether the establishment of an industry in the United States has been "materially retarded" by less-than-fair-value ("dumped") imports and, therefore, this is a case of first impression. All the parties agree that this determination must rest on a finding that the nascent U.S. industry is viable before it is entitled to protection from imports. (This long-standing principle was recognized in 1791 by Alexander Hamilton in his "Report on Manufacturers.") The parties disagree over the standard for assessing an industry's viability.

Here, the individual members of the Commission never articulated a common legal standard and, in fact, voiced sharply different opinions. Faced with widely different views, the lower court resorted, admittedly, to inferences and assumptions to reformulate the Commission's views and identify a single legal standard which the court then ascribed to the Commission's majority.

Equally wrong, the lower court also held that the Commission's determination of "viability at inception" was supported by substantial evidence of record, even though the Commission's conclusion was based on fundamentally (and admittedly) flawed evidence and ignored other evidence which the court admitted was directly relevant.

Statement Of Facts

The product at the center of this litigation — dried salted codfish — has long been a traditional food for peoples living along the Mediterranean and Caribbean Seas and throughout Latin America. U.S. demand for dried salted fish is concentrated in Puerto Rico. Petitioner BMT, a United States corporation, imports this product from Canada and elsewhere and sells it in Puerto Rico.

Codfish Corp., of Ponce, Puerto Rico, the defendant-intervenor in the lower court, is the only company trying to produce dried salted codfish in the United States. In 1982, the promoters of Codfish Corp. produced a so-called "market feasibility study." According to this study, the proposed project would involve the purchase of semi-processed (or "wet-salted") codfish in Canada or Norway, the transport of this fish to Puerto Rico and the drying of the fish at a local facility. The feasibility study alleged that the new company would make substantial profits in its first year of operation.

The company commenced operations in December 1982, but began to lose money immediately. Faced with serious losses, Codfish Corp. commissioned a second study by the Citicorp Capital Markets Group to assess the viability of the company's operations and to provide advice concerning future options. The Citicorp study concluded, in substance, that the company's existing operations were not viable[1] and recommended that the company develop a new source of "wet-salted" fish in Alaska. However, Codfish Corp. was unable to secure the financing needed to implement the Citicorp study's recommendations and, in November 1985, filed a petition for reorganization under Chapter 11 of the U.S. Bankruptcy Code.[2]

The Antidumping Proceeding And The Commission's Determination

On July 19, 1984, Codfish Corp. filed an antidumping petition

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1. Since the contents of the Citicorp study are confidential business information covered by a judicial protective order, the specific conclusions of the study are discussed in the confidential supplement to this petition.

2. These bankruptcy proceedings are still pending.

with the U.S. Department of Commerce and the U.S. International Trade Commission. In July 1985, the Commission, by a 4-to-1 vote, ruled that the establishment of an industry in the United States (represented solely by Codfish Corp.) was "materially retarded" by reason of less-than-fair-value imports of dried salted codfish from Canada.[3]

The majority agreed with the contention of all parties that "[t]he viability of the nascent domestic industry is a relevant consideration."[4] Accordingly, the Commissioners focused on "the Canadian producers' and importers' argument . . . that [Codfish Corp.'s] operation in Puerto Rico is inherently unviable, and could never operate profitably, regardless of LTFV imports."[5] The opinion by the majority Commissioners concluded that:

> On the basis of our analysis of [Codfish Corp.'s] marketing and feasibility study, the initial business plan of the petitioner appears reasonably calculated and could have succeeded.[6]

The majority also determined that Codfish Corp. possessed "future viability" in the sense of being "able to recommence operations . . . and stabilize its production and sales at a level which will allow it to become established."[7]

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3. Appendix D at 25a.

4. *Id.* at 32a. However, as discussed *infra* at notes 20-21 and accompanying text, two members of the Commission majority qualified their views in certain respects. *See* Appendix D at 31a-32a nn. 16, 20.

5. *Id.* at 31a.

6. *Id.* at 32a.

7. *Id.* at 33a. One Commissioner, Mr. Eckes, did not consider future viability and therefore did not join this determination.

Having resolved the issue of viability in favor of Codfish Corp., the Commission ruled that the performance of the company was "substantially poorer than that which could reasonably have been expected" and that less-than-fair-value imports from Canada had contributed to the material retardation.[8]

The Decisions Of The U.S. Court Of International Trade

The Court of International Trade first addressed the legal standard used by the Commission in determining that Codfish Corp. was "viable." The court agreed that "Codfish Corporation's viability at inception is a relevant consideration in this case."[9] However, the court admitted that the "majority opinion does not explicitly state that the Commission was considering the viability of Codfish Corporation from the time of its inception," but said that "*this fact may be inferred*" from the opinion.[10] On the basis of this inference, the court held that a majority of the Commission had properly considered viability at inception.

The court also ruled that the consideration of "future viability" by three members of the Commission majority was erroneous, but that this error "does not compel remand."[11]

On the issue of substantial evidence, the court addressed

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8. *Id.* at 31a, 33a-39a.

9. Appendix C at 16a. The court noted that no party contested the relevance of viability at inception. *Id.*

10. *Id.* at 17a n.4 (emphasis supplied).

11. *Id.* at 19a.

BMT's arguments that the Commission should not have relied on Codfish Corp.'s patently and obviously flawed feasibility study, and had erroneously failed to consider the Citicorp study (which concluded that Codfish Corp. was not viable).[12] Despite its agreement with BMT that the Citicorp report was directly relevant to the issue of viability at inception,[13] the lower court held "that the Commission's determination was supported by substantial evidence."[14]

On BMT's motion for rehearing, the court adhered to its original decision, despite once again noting BMT's "assert[ion] . . . that the initial feasibility study prepared on behalf of Codfish Corporation and the break-even analysis prepared by the Commission staff are 'a mass of obviously incomplete data, demonstrably faulty assumptions and half-baked accounting techniques.' "[15]

The Decision Of The Court Of Appeals

The Court of Appeals, on the basis of the lower court's decision, affirmed the judgment of the trial court that the Commission's determination was supported by substantial evidence and was not otherwise contrary to law.[16]

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12. *Id.* at 20a-21a.

13. *Id.* at 21a-22a.

14. *Id.* at 22a.

15. Appendix B at 7a.

16. Appendix A at 2a.

REASONS FOR GRANTING THE WRIT

The decisions of the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit are in conflict with decisions of this Court on two of the most basic principles of administrative law: first, the administrative agency, and not the reviewing court, must articulate a legally sufficient explanation for its action; and second, an agency's determination is supported by substantial evidence only if, based on all relevant evidence in the record, a reasonable mind might accept that evidence as adequate to support the determination. The decisions below so egregiously misapplied their roles as reviewing courts and so grossly misread the evidence of record as to warrant this Court's exercise of its powers of supervision.

The Commission's failure to articulate the legal standard for its determination, the court's substitution of its own rationale for that of the Commission and the serious misreading of the evidence of record are impermissible acts which frustrate the statutory framework of judicial review of administrative action. The result is even more egregious since it occurs in the context of a case of first impression.

I.

THE LOWER COURT IMPROPERLY SUPPLIED A RATIONALE NOT ARTICULATED BY THE COMMISSION.

This Court has held on numerous occasions that it is the administrative agency, and not a reviewing court, that "must articulate a satisfactory explanation for [the agency's] action, including a 'rational connection between the facts found and the

choice made.' "[17] Where the agency has failed to provide a legally sufficient explanation for its action "[t]he reviewing court should not attempt itself to make up for such deficiencies; [the reviewing court] may not supply a reasoned basis for the agency's action that the agency has not given."[18] In short, the reviewing " 'court is not empowered to substitute its judgment for that of the agency.' "[19]

In this case, the four majority Commissioners clearly did not adopt a common legal standard. Commissioner Eckes, explained that, unlike the other majority Commissioners, he *"focused on the viability* of the domestic industry *during the period of investigation"* and "d[id] not believe that the petitioner must prove

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17. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246 (1962)); *accord, e.g., Bowen v. American Hospital Ass'n*, 476 U.S. 610, ____, 106 S.Ct. 2101, 2112-2113 (1986) (plurality opinion by Stevens, J., joined by Marshall, Blackmun, and Powell, JJ.); *Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc.*, 462 U.S. 87, 105-106, 103 S.Ct. 2246, 2256 (1983); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286-287, 95 S.Ct. 438, 442-443 (1975).

18. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., supra*, 463 U.S. at 43, 103 S.Ct. at 2867 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577 (1947)); *accord, e.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, 419 U.S. at 285-286, 95 S. Ct. at 442; *cf. Baltimore Gas & Electric Co. v. National Resources Defense Council, Inc., supra*, 462 U.S. at 105-106, 103 S. Ct. at 2256 ("Our only task is to determine" whether the agency provided a legally sufficient explanation.).

19. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra*, 419 U.S. at 285, 95 S. Ct. at 442 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 824 (1971)); *cf. Bowen v. American Hosp. Ass'n, supra*, 106 S.Ct. at 2112 ("Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action.").

future viability . . . . "[20] Commissioner Lodwick stated that he "*focused his attention* . . . primarily *on the viability of the domestic industry at its inception* . . . . [but] also believe[d] that . . . future viability is relevant."[21] The other two majority Commissioners, Chairwoman Stern and Commissioner Rohr, did not set forth independent positions, but apparently looked at something identified as "inherent viability" and at future viability.

On review, the lower court ignored the individual views of the Commissioners. Instead, the court concluded that the history of Codfish Corp. divides into two time periods. According to the lower court, the first period was "viability at inception," which apparently meant the viability of the company as it existed when it commenced operations. (The court ruled that this period of "inception" was the proper time frame for the Commission's consideration.) The second period identified by the court was "future viability," which presumably meant the viability of the company in its restructured form. (The court ruled that this period of "future viability" should not have been considered by the Commission.)

But these time periods are not delineated anywhere in the Commission's opinion. In fact, the lower court correctly observed that the Commissioners' opinion "does not explicitly state that the Commission was considering the viability of Codfish Corporation from the time of its inception."[22] Instead, the court "*inferred*"[23] that the majority Commissioners had done so. The court erroneously believed that it could properly "infer" an

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20. Appendix D at 31a n.16, 32a n.21 (emphasis added).

21. *Id.* at 32a n.20 (emphasis added).

22. Appendix C at 16a n.4.

23. *Id.* (emphasis added).

explanation that the Commission did not articulate.

Equally improper, the lower court stated that "the Commission *appears* to have used the terms 'inherent viability' and 'viability at inception' interchangeably."[24] This statement is contradicted by the lower court's previous statement that the Commission's determination did not explicitly say that it was considering viability at inception. To the extent the apparent explanation of the Commission's views were first advanced in the Commission's brief to the lower court, the court improperly relied on a *post hoc* rationalization by counsel instead of the grounds stated by the Commission.[25] In any event, the court conceded that the Commission "*appears* to have used the terms . . . interchangeably," and it is obvious that the court based its decision on what it assumed the Commission meant to say — not what the Commission said.

The lower court conceded that the "Commission's use of the term 'future viability' is somewhat confusing."[26] However, the court resolved the confusion by volunteering that "[i]n this investigation, . . . the term 'future viability' refers to the viability of Codfish Corporation only in its restructured condition."[27] Here again, the court supplied an explanation not set forth in the Commission's determination.

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24. *Id.* at 17a n.5 (emphasis added).

25. *See e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., supra,* 463 U.S. at 50, 103 S. Ct. at 2870 ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action").

26. Appendix C at 18a n.6. The court could not ascertain with certainty whether the Commission had used this term to mean the ability to survive into the future or the viability of Codfish Corp. in its restructured form foreseen in 1985.

27. *Id.* at 18a n.6.

Further, the lower court pointed out that "[o]ne of the four commissioners in the majority stated that he had considered 'viability during the period of investigation' rather than viability at inception."[28] Despite this explicit statement, the court ruled that he "*appears* to have considered the same factors as the other members of the majority."[29] Once again, the lower court's decision rests on what the court assumed, and not on what the Commissioner said.

In sum, based entirely on what the majority "appeared" to have done and what the court "inferred," the reviewing court supplied its own rationale to support the Commission's determination. In so doing it violated a basic precept of administrative law. Instead, it should have remanded the case for further proceedings in accordance with law.[30]

II.

THE COMMISSION'S DETERMINATION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Feasibility Study Contains A Blatant Error That Invalidates Its Conclusions.

The majority Commissioners admitted that their assessment of the viability of Codfish Corp. at its inception was made "[o]n

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28. *Id.* at 20a n.9.

29. *Id.* (emphasis added). The lower court ruled that if Commissioner Eckes' standard was not the same as "viability at inception," his decision was erroneous. *Id.*

30. *Cf. Babcock & Wilcox Co. v. United States*, 2 CIT 74, 76, 521 F. Supp. 479, 482 (1981) (remanding case for further consideration where "[t]he views of the Commissioners . . . are diverse"), *vacated as moot*, 4 CIT 3 (1982).

the basis of our analysis of [Codfish Corp.'s] marketing and feasibility study . . . ."[31] Their reliance on the study was grossly misplaced, for it contains a blatant error which, if corrected, leads to the conclusion that Codfish Corp. was expected to be a losing venture from the beginning.

The feasibility study's projection of expenses, sales, and profits purportedly shows that the company would have substantial profits in its first year of business.[32] However, this projected conclusion requires the company to sell a substantial quantity of merchandise that it was not planning to produce. In the Court of Appeals, counsel for the Commission conceded that the feasibility study contains this error.[33] If the error is corrected, the feasibility study shows that the company would suffer massive losses, without showing any possibility of future profitability.

This error is fatal to the Commission's determination that Codfish Corp. was a viable entity at its inception. The Commission determined that "[t]he elements of viability which are important in this investigation [include] the ability to produce a . . . product . . . which can be sold at a price which is competitive with fairly

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31. Appendix D at 32a. The Commissioners' opinion does not identify any other evidence of record that was considered on this issue.

For purposes of Point II of the Argument, BMT assumes, *arguendo*, that the lower court correctly ruled that "viability at the inception" was the standard applied by all members of the Commission majority.

32. Since the entire contents of the feasibility study are confidential business information covered by a judicial protective order, the conclusions of the study and the error in the projected earnings are discussed in the confidential supplement to this petition.

33. *See* Appellee's Confidential Brief at 39-40, *BMT Commodity Corp. v. United States*, App. No. 88-1188 (May 4, 1988).

traded imports."[34] But Codfish Corp.'s own feasibility study shows (after the blatant error is corrected) that it could not make a profit.

Both courts below disregarded this error in assessing the substantiality of the evidence of record. This Court has unequivocally held that substantial evidence " 'means such relevant evidence as a reasonable mind might find adequate to support a conclusion' "[35] and that the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[36] Had this standard been properly applied to the evidence of record in this case, the result below could not stand.

B. The Commission Failed To Consider Relevant Evidence In The Citicorp Study.

The lower court apparently agreed with BMT's argument that, if the Commission had failed to consider the Citicorp study, its investigation would have been legally insufficient. The court explained that the "absence of information necessary for a thorough analysis may render a [Commission] determination unsupported by substantial evidence."[37] Moreover, the lower court

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34. Appendix D at 32a.

35. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 S.Ct. 456, 459 (1951) (citing *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 216-217 (1938)).

36. *Universal Camera Corp. v. N.L.R.B., supra*, 340 U.S. at 488, 71 S.Ct. at 464.

37. *USX Corp. v. United States*, 11 CIT ____, 655 F. Supp. 487, 493 (1987); *accord, e.g., Kenda Rubber Industrial Co. v. United States*, 10 CIT ____, 630 F. Supp. 354, 358 n.4 (1986) (Reversible error would exist where "the Commission ha[s] not conducted a thorough investigation as required by statute."); *Budd Co. v. United States*, 1 CIT 67, 74, 507 F. Supp. 997, 1003 (1980) ("[T]here has been a lack of diligence by the Commission in seeking information available to it . . . .").

rejected the government's contention that the Citicorp study was not a reasonable basis to assess viability at the inception because, as the government argued, the study was " 'prepared with the benefit of two years experience, and the hindsight which accompanies experience . . . .' "[38] Instead, the court ruled that the timing of the study does not diminish its "probative value on the issue of viability" and that "[a] report analyzing the progress of an industry over time may contain important insights into how . . . specific factors affect profitability . . . ."[39]

However, the lower court erroneously concluded that the Commission's failure to consider the Citicorp study did not warrant reversal because the Commission had considered the study in assessing future viability.[40] This reasoning ignores the court's own ruling that future viability should not have been considered; it also erroneously assumes that the Commission would have reached the same determination on viability at inception if it had considered the Citicorp study.

The affirmance of the lower court's position by the Court of Appeals in this case is at variance with the views of other circuit courts of appeals. In analogous cases the reviewing court (in other circuits) has reversed and remanded an agency determination where the agency had erroneously failed to consider relevant evidence.[41]

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38. Appendix C at 21a.

39. *Id.* at 21a-22a.

40. *Id.* at 22a.

41. *E.g., American Rubber Products Corp. v. N.L.R.B.*, 214 F.2d 47, 51 (7th Cir. 1954) (N.L.R.B. finding reversed where "the Board erred in holding [that certain] evidence lacked probative value . . . . "). *See generally* 3 K. Davis, *Administrative Law Treatise* § 16:11 (2d ed. 1980).

In summary, if the Commission had considered the Citicorp study, the Commission would, in all likelihood, have determined that the company was not viable. The Commission failed to consider the study for this purpose and therefore committed reversible error; as did the reviewing courts in sustaining the Commission's determination.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

Dated: New York, New York
November 7, 1988

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BMT COMMODITY CORP. and Delca Distributors Inc.,

Plaintiffs-Appellants,

v.

The UNITED STATES,

Defendant-Appellee,

Codfish Corp.,

Defendant.

Appeal No. 88-1188

United States Court of Appeals,
Federal Circuit

Aug. 9, 1988

Appealed from U.S. Court of International Trade; Restani, Judge.

Jerry P. Wiskin, Freeman, Wasserman & Schneider, New York City, argued for plaintiffs-appellants. With him on the brief were Jack Gumpert Wasserman and Patrick C. Reed.

Judith M. Czako, Office of General Counsel, U.S. Intern. Trade Com'n, Washington, D.C., argued for defendant-appellee. With her on the brief were Lyn M. Schlitt, Gen. Counsel and James A. Toupin, Asst. Gen. Counsel.

Appendix A

Before SMITH and MAYER, Circuit Judges, and BENNETT, Senior Circuit Judge.

PER CURIAM.

BMT Commodity Corporation (BMT) appeals from the judgment of the Court of International Trade in *BMT Commodity Corp. v. United States,* 667 F.Supp. 880 (Ct. Int'l Trade 1987) (Restani, J.). In this judgment the court sustained the International Trade Commission's (Commission) decision "that 'the establishment of an industry in the United States is materially retarded by reason of imports of dried heavy salted codfish from Canada, which the Department of Commerce has determined are sold at less than fair value.' " *Id.* at 881. BMT contests whether the Commission applied the proper legal standard, whether the Commission's procedures were understood by the court, whether the Commission's determination was supported by substantial evidence, and whether the Court of International Trade correctly ruled that plaintiffs should have contested adverse confidential evidence during the Commission's proceedings.

We find no justifiable basis for overturning the decision of the trial court and we see no need to reiterate its published analysis, which we adopt. Accordingly, we affirm on the basis of that opinion.

AFFIRMED.

APPENDIX B—OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE (DENYING REHEARING)

BMT COMMODITY CORP.,

and

Delca Distributors, Inc.,

Plaintiffs,

v.

The UNITED STATES,

Defendants,

and

Codfish Corp.,

Defendant-Intervenor.

No. 85-7-00915

United States Court of International Trade

Nov. 19, 1987

Freeman, Wasserman & Schneider (Jack G. Wasserman and Jerry P. Wiskin), New York City, for plaintiffs.

Lyn M. Schlitt, Gen. Counsel, James A. Toupin, Asst. Gen. Counsel and Judith M. Czako, U.S. International Trade Com'n, Washington, D.C., for defendants.

Appendix B

Patton, Boggs & Blow (Bart S. Fisher, Michael D. Esch, and Daniel E. Waltz), Washington, D.C., for defendant-intervenor.

OPINION

RESTANI, Judge.

Plaintiffs, BMT Commodity Corp. and Delca Distributors, Inc., pursuant to Rule 59 of the Rules of this court, move for a rehearing of this court's opinion and judgment in this action. *BMT Commodity Corp. v. United States,* 11 CIT ____, 667 F.Supp. 880 (1987). That opinion and judgment denied plaintiffs' motion for judgment based upon the administrative record challenging the International Trade Commission's (Commission) final affirmative dumping determination in *Certain Dried Salted Codfish from Canada,* USITC Pub. No. 1711, Inv. No. 731-TA-199 (July 1985) (ITC Determination).

In their motion for rehearing, plaintiffs argue that: (1) the court misconstrued the opinions of the Commission regarding "viability at inception" and "viability in the future," and (2) the court misinterpreted or overlooked evidence of record. For the following reasons, plaintiffs' motion for rehearing is denied in all respects.

A motion for rehearing is addressed to the sound discretion of the court. *United States v. Gold Mountain Coffee, Ltd., et al.,* 8 CIT 336, 601 F.Supp. 212 (1984). The exceptional circumstances for granting a rehearing were clearly enunciated in *W.J. Byrnes & Co. v. United States,* 68 Cust. Ct. 358, C.R.D. 72-5 (1972) as follows:

A rehearing may be proper when there has

> been some error or irregularity in the trial, a serious evidentiary flaw, a discovery of important new evidence which was not available, even to the diligent party, at the time of trial, or an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which severely impaired a party's ability to adequately present its case. In short, a rehearing is a method of rectifying a significant flaw in the conduct of the original proceeding.

68 Cust. Ct. at 358 (footnote omitted).

The purpose of a rehearing is not to retry a case. *Brookside Veneers, Ltd. v. United States, II* CIT____, 661 F.Supp. 620 (1987), *appeal docketed,* No. 87-1379 (Fed. Cir. June 4, 1987).

With regard to their first argument, plaintiffs assert specifically that the court wrongly inferred that the Commission majority explored Codfish Corporation's viability at inception. In addition, plaintiffs allege that the court incorrectly concluded that Codfish Corporation filed a petition under the bankruptcy laws in late 1984 and that this error "colors the relevant time frames which all parties (and the Court) recognize as critical and bears directly on the sufficiency of the evidence relied on by the Commission's majority." Plaintiffs' Memorandum at 4-5.

These grounds possess none of the criteria upon which a rehearing may be granted. Plaintiffs argued at length in their motion for judgment on the administrative record that the Commission failed to focus its material retardation analysis on Codfish Corporation's "viability at inception." They are not now entitled to a rehearing simply because the court rejected those

arguments. This court has consistently denied motions for rehearing premised solely on the moving party's dissatisfaction with the trial court's decision. *E.g., V.G. Nahrgang Co. v. United States,* 6 CIT 210 (1983); *Industrial Fasteners Group v. United States,* 3 CIT 104 (1982); *Gold Mountain Coffee,* 8 CIT 336, 601 F.Supp. 212.

There appears to be some confusion between the date of bankruptcy and the date operations of Codfish Corporation first ceased. In fact, the bankruptcy petition appears not to have been filed until November, 1985, several months after the Commission's final determination of July, 1985 and approximately a year after Codfish Corporation first discontinued its operations. Any error as to the date of official filing is not, however, a "significant flaw" which gives rise to the right for rehearing. In fact, such an error would in no way affect the substance of the court's decision. Because this court concluded, and plaintiffs agree, that the appropriate focus of analysis of viability of the domestic industry in this material retardation case was at its inception, the precise date at which the bankruptcy petition was filed is inconsequential. Furthermore, to the extent the court discussed viability other than based on analysis of initial feasibility, it was concerned with plans for future operations, not change in legal status under the bankruptcy laws.

Plaintiffs' second argument in support of their motion is that the court misinterpreted or overlooked evidence of record. Specifically, they claim that the court erroneously concluded that plaintiffs did not contest the raw data contained in Codfish Corporation's initial feasibility study; and that the court misconstrued the record in determining that there was substantial evidence to establish that Codfish Corporation had sufficient working capital and that the market for dried salted codfish was not declining.

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Plaintiffs assert now, as they did in their original brief, that the two documents on which the Commission relied, the initial feasibility study prepared on behalf of Codfish Corporation and the break-even analysis prepared by the Commission staff, are "a mass of obviously incomplete data, demonstrably faulty assumptions and half-baked accounting techniques." Plaintiffs' Memorandum at 12. In support of this general condemnation, plaintiffs claim that transportation costs utilized in the initial feasibility study were flawed and that the study's reliance on the procurement of raw materials from traditional source countries was misplaced. Plaintiffs' Memorandum at 13.

In making its determination, the Commission concluded that any disadvantages Codfish Corporation may have had vis-a-vis Canadian producers in the areas of transportation costs or in procuring raw materials were offset by advantages gained in reduced labor costs and easy access to local markets. ITC Determination at 7. The court found this conclusion to be supported by substantial evidence in the record. 667 F.Supp. at 885-86.

Plaintiffs' present assertion that "the raw data in the initial feasibility study regarding Codfish Corporation's transportation costs was specifically attacked and unquestionably demonstrated to be seriously flawed" is simply incorrect. Plaintiffs' Memorandum at 13. The only attack on transportation costs by plaintiffs prior to the motion for rehearing was leveled at raw data contained in Codfish Corporation's May, 1985 study, not the initial feasibility study, and relates to the cost of transporting raw material from "new sources." Plaintiffs' Main Brief supporting their Rule 56.1 motion at 30. The accuracy of this data, which is relevant only to the issue of Codfish Corporation's viability after it was already affected by LTFV imports, affords

plaintiffs no basis for a rehearing. Likewise, plaintiffs' preference for conclusions contained in the Citicorp study regarding the cost effectiveness of Codfish Corporation procuring raw materials from traditional source countries over those contained in the initial feasibility study affords plaintiffs no basis for a rehearing. Plaintiffs, once again, are simply repeating arguments previously made in this case which have been rejected by the court.

Plaintiffs state two objections to the court's treatment of the working capital issue: first, the court should not have faulted plaintiffs for failing to present specific evidence regarding Codfish Corporation's capital needs because the Commission denied plaintiffs' request for disclosure of Codfish Corporation's initial feasibility study; and second, the court's conclusion that Codfish Corporation's working capital was adequate was based on unsubstantiated statements of counsel which demonstrates an absence in the record of substantial evidence which would support this factual determination by the court. Plaintiffs' Memorandum at 14-17.

While access to Codfish Corporation's feasibility study might have helped plaintiffs prepare their argument, given the availability of other sources of relevant information, including the opportunity to question Codfish Corporation's president Paulo da Cunha at the May 20, 1985 ITC hearing, the court is not convinced that the Commission's refusal to disclose the feasibility study irreparably hindered plaintiffs' presentation. In any case, disputes regarding access to information at the administrative level should be resolved during the administrative proceeding. Substantial evidence exists in the record to support the Commission's determination and the determination will not be overturned merely because, under other circumstances, plaintiffs might have presented more evidence.

Appendix B

Plaintiffs argue that the court's opinion on working capital cites only statements of counsel in support of this conclusion and not actual evidence in the record. Although counsels' statements are cited, this does not signify that evidence of record does not exist. The court had before it the entire record compiled before the Commission, including the initial feasibility study, when it evaluated plaintiffs' arguments and the Commission's determination. *E.g.,* ITC Staff Report at A-31 to A-38; Codfish Corporation's Initial Market Feasibility Study, *reprinted in* ITC Staff Report A-101, A-109 (Appendix C). Based upon this evaluation of the record, the court found that substantial evidence existed to support the conclusion that Codfish Corporation did not lack working capital with which to purchase inventory. If plaintiffs wish to take issue with this evaluation, they may not do so now before this court. "An allegedly incorrect evaluation of evidence by a trial court is not a proper ground for rehearing but for appeal." *Eiseman-Ludmar Co. v. United States,* 2 CIT 109 (1981). Although this matter did not come before the court for *de novo* hearing, the proposition remains true here as well.

Plaintiffs' final argument, that substantial evidence does not exist to support the conclusion that the demand for cod was not declining, must also be dismissed. Plaintiffs cite a statement by the Puerto Rico Chamber of Commerce that demand in Puerto Rico for dried salted fish had declined. In support of the contrary conclusion, the Commisson relied upon data that the sales volume of cod was stable at relatively high price levels. Plaintiffs contend that this data is inaccurate and beyond the scope of investigation because the data was not compiled at the time of Codfish Corporation's inception. First, this argument takes issue with the court's evaluation of evidence and provides plaintiffs with no basis for a rehearing. Second, this argument is not compelling. The pricing data relied upon by the Commission appears in the

appendix to the determination. The fact that the data was compiled in 1985 should not obviate its probative value. In verifying the relevance of portions of the Citicorp Study, the court recognized that following the progress of an industry could reveal important information about initial viability, (provided LTFV effects were taken into consideration). Consumer demand is clearly a factor that may be better understood by observing fluctuations over time. Thus, there does not seem to be any inconsistency in the court's analysis.

In summary, plaintiffs have advanced no argument that the court did not consider in its original decision and have presented no acceptable grounds for granting a rehearing.

Accordingly, plaintiffs' motion for a rehearing, pursuant to Rule 59, is denied and the original decision must be adhered to.

APPENDIX C—OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE (DECISION AND JUDGMENT)

BMT COMMODITY CORP., and Delca Distributors, Inc.,

Plaintiffs,

v.

UNITED STATES and United States International Trade Commission

Defendants,

and

Codfish Corp.,

Defendant-Intervenor.

Court No. 85-7-00915

United States Court of International Trade.

July 22, 1987.

Freeman, Wasserman & Schneider, Jack G. Wasserman, New York City, for plaintiffs.

Lyn M. Schlitt, General Counsel, Michael P. Mabile, Asst. General Counsel and Judith M. Czako, U.S. Intern. Trade Com'n, Washington, D.C., for defendants.

Appendix C

Patton, Boggs & Blow, Bart S. Fisher and Michael D. Esch, Washington, D.C., for defendant-intervenor.

OPINION

RESTANI, Judge:

Plaintiffs initiated this action to challenge the International Trade Commission's (Commission) final affirmative dumping determination in *Certain Dried Salted Codfish from Canada,* Inv. No. 731-TA-199, USITC Pub. No. 1711.[1] In its determination, the Commission concluded that "the establishment of an industry in the United States is materially retarded by reason of imports of dried heavy salted codfish from Canada, which the Department of Commerce (Commerce) has determined are sold at less than fair value (LTFV)." ITC Determination at 3.

The domestic industry under review consists of only one company, defendant-intervor Codfish Corporation, which commenced operations in November 1982, in Ponce, Puerto Rico.[2]

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1. The results of the final determination are also published at 51 Fed.Reg. 16,904 (May 7, 1986).

2. Although the Tariff Act of 1930 does not specifically include Puerto Rico as part of the United States for purposes of the Act, plaintiffs have not contested this issue. The court notes that the Tariff Schedules of the United States and the Antidumping Act of 1921 both contained definitions of "The United States" which encompassed Puerto Rico. The Trade Agreements Act of 1979 did not adopt the definition of "United States" included in the Antidumping Act of 1921, but there is no indication that Congress intended to exclude Puerto Rico from the purview of the Act. *See* S. Rep. No. 249, 96th Cong., 1st Sess. at 107 (no substantial rules intended to be changed except as indicated in the Report), *reprinted in* 1979 U.S.Code Cong. & Admin.News 381, 493.

Id. at 5. Due to declining import prices, Codfish Corporation suffered large operating losses from 1982 through the third quarter of 1984. On July 19, 1984, it filed its antidumping petition; five months later it ceased operating and filed a petition for reorganization under the federal bankruptcy laws. At the time the final determination was published, Codfish Corporation had taken steps to reopen its plant. It received approval for a $2 million line of credit from the Government Development Bank, and negotiated several new agreements for the procurement of fresh cod and the distribution of its processed product. *Id.* at 8-9.

In its determination, the Commission concluded that a pervasive pattern of underselling by dominant Canadian imports of codfish had resulted in the suppression and depression of domestic prices. *Id.* at 11. The Commission confirmed virtually all of defendant-intervenor's allegations of lost sales and revenues, *id.* at 12, and further found that the prices of Canadian imports, after falling continuously from 1982 through the third quarter of 1984, rose across the board after defendant-intervenor ceased production in the final quarter of 1984. *Id.* at 11.

Plaintiffs do not contest these conclusions; rather, they challenge a portion of the legal framework developed by the Commission for cases involving the material retardation of domestic industries. The parties agree that existing case law, administrative precedent, and legislative history offer little guidance in this area. Prior Commission determinations establish only that "(1) application of the material retardation standard is not limited to industries that have not yet begun production, but extends as well to new facilities that have initiated production but have not yet stabilized their operations; (2) because the attempt to establish a new industry is inherently unique, determination of whether the establishment of an industry is materially retarded is to be

made on a case-by-case basis; and (3) in instances involving an industry that has not yet undertaken production, there must be a sufficient indication that the industry has made a 'substantial commitment' to commence production."[3] *Id.* at 4-5.

The Commission developed additional legal standards to complete the analytical framework necessary for its material retardation analysis. It first attempted to ascertain whether the investigation involved material injury or the threat thereof, rather than material retardation. Because defendant-intervenor was "never able to stabilize production at a level which even approached a reasonable break-even point," the Commission determined that its operations were never "established," and, therefore, that material retardation was the applicable legal standard. *Id.* at 5.

Having concluded that material retardation was at issue, the Commission then stated that the proper inquiry for determining the presence of material retardation was "whether the level of activities of Codfish Corporation reflect merely the normal start-up conditions of a company entering an admittedly difficult market or whether the performance is worse than what could reasonably be expected and thus be deemed materially retarded." *Id.* The majority determined that Codfish Corporation's performance was, in fact, worse than what could reasonably be expected, but it did not conclude that material retardation had been established at

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3. *See, e.g., Thin Sheet Glass from Switzerland, Belgium, and the Federal Republic of Germany,* Inv. Nos. 731-TA-127, 128, and 129, USITC Pub. No. 1376 (1983) (Preliminary Dumping); *Certain Commuter Airplanes from France and Italy,* Inv. Nos. 701-TA-174 and 175, USITC Pub. No. 1296 (1982) (Preliminary Dumping); *Salmon Gill Fish Netting of Manmade Fibers from Japan,* Inv. No. 751-TA-5, USITC Pub. No. 1234 (1982) (Review of Dumping Determination under § 751(b) of the Tariff Act of 1930).

this point. Instead, the majority stated that the viability of defendant-intervenor's business was also a relevant concern in this case. *Id.* at 7. The elements of viability that the Commission considered important in this case were "the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price which is competitive with fairly traded imports." *Id.* at 8. After finding that Codfish Corporation's business was viable, the Commission concluded that material retardation had been established. *Id.* at 8-9.

Plaintiffs object to the Commission's treatment of the viability issue, claiming that the legal standard of viability formulated by the majority was not in accordance with law, and that its finding of viability was unsupported by substantial evidence. These issues are addressed below.

I. *The Legal Propriety of the Commission's Viability Standard*

Plaintiffs argue that the Commission's determination was not in accordance with law because a majority of the commissioners did not adopt "a single, identifiable standard of law" on the issue of viability. Plaintiffs' Reply Brief at 7. In the determination, one commissioner focused solely upon the viability of the domestic industry *during the period of investigation.* He explicitly stated that, in his opinion, the petitioner need not prove future viability. ITC Determination at 7 n. 16. Another commissioner considered the viability of Codfish Corporation *at its inception,* but stated that future viability was also relevant "as it strengthen[ed] his conclusions concerning the viability of the domestic industry." *Id.* at 8 n. 20. The two remaining commissioners who concurred in the majority opinion focused upon the viability of Codfish Corporation at its inception and in the future. *Id.* at 7-8.

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In order for the Commission's determination to be upheld in this case, the court must be able to discern from the determination that a majority of the Commission has based its conclusions upon legally sufficient reasoning. *See* 19 U.S.C. § 1677(11)(c)(1982). *C. USX Corp. v. United States,* 11 CIT ____, 655 F.Supp. 487, 497 (1987) (action remanded where majority of commissioners failed to cumulate imports for reasons contrary to law). The court will first consider the soundness of the Commission's legal approach and will then discuss the extent to which the legal underpinnings were accepted by the individual commissioners.

None of the parties to this proceeding have challenged the Commission's conclusion that Codfish Corporation's viability at inception is a relevant consideration in this case.[4] As plaintiffs have stated, it would be counterproductive for the unfair trade laws to provide relief to domestic industries that cannot compete. *See* R. Caves and R. Jones, *World Trade and Payments* 260 (1973) ("protection is not worthwhile if the [domestic] industry could never compete"); *accord,* J. Viner, *Dumping: A Problem in International Trade* 137 (1966). The imposition of duties upon foreign imports would only increase costs to American consumers, without providing a reciprocal benefit to nascent American industries. In its determination, the Commission considered Codfish Corporation's labor, energy and raw materials costs; the cost-effectiveness of its distribution and marketing channels; and the effect of the hot, humid Puerto Rican climate on the cost

4. The majority determination does not explicitly state that the Commission was considering the viability of Codfish Corporation from the time of its inception; however, this fact may be inferred from the Commission's statement that it analyzed the company's *initial* business plan and *original* marketing and feasibility study. ITC Determination at 8.

of drying the codfish. ITC Determination at 7-8. These variables can all affect the viability of a nascent enterprise, and therefore were proper objects of scrutiny for the Commission.[5]

Although it agrees with the analysis of "viability at inception" performed by the Commission, the court has some reservations about the Commission's analysis of "future viability." Observing that Codfish Corporation had ceased operations and filed for bankruptcy in November 1984, the Commission stated that "[t]he future viability of petitioner's business operations is a relevant

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5. Codfish Corporation seizes upon language in the determination to argue that the Commission was solely concerned with *inherent* viability. *See* ITC Determination at 7. It contends that the inherent viability standard requires the Commission to conclude that an industry is not viable only if *"inherent* disadvantages *entirely unrelated to the effects of LTFV imports* . . . remove *any* commercial possibility that the industry could become established." Brief of Defendant-Intervenor at 13. In effect, Codfish Corporation requests that the Commission "defer to the business judgment of investors, so long as their plan of operations is within the realm of commercial reasonableness." *Id.* at 12.

In the determination and in its brief, the Commission appears to have used the terms "inherent viability" and "viability at inception" interchangeably. Its finding of viability was based upon evidence that "the initial business plan of [Codfish Corporation] appear[ed] reasonably calculated and could have succeeded." ITC Determination at 8. This analysis of viability does not appear to be as deferential to the judgment of investors as the interpretation offered by Codfish Corporation. Some of the factors considered by the Commission, such as marketing channels and energy costs are not truly *inherent* in the nature of an enterprise since they may change over the short term. Furthermore, nothing in the Commission's determination implies that the judgment of investors, no matter how misguided, should be accorded substantial deference. Without attempting to define the parameters of the viability standard further, a task the Commission will no doubt undertake in future cases, the court simply concludes that the Commission acted reasonably in the selection of factors to be considered in making the viability determination here.

issue in determining whether the establishment of a domestic industry is being materially retarded." ITC Determination at 8. It then discussed Codfish Corporation's new plans for recapitalization, product distribution, and alternative sources of cod supply. *Id.* at 8-9. On the basis of this information, the Commission performed a "break-even analysis" of Codfish Corporation's operations to determine whether it "could be able to recommence operations, given fairly traded competition from imports, and stabilize its production and sales at a level which will allow it to become established." *Id.* at 9.[6]

The import of the Commission's analysis is that it could have *denied* relief based upon the conditions under which Codfish Corporation was to be reorganized. In other words, even if it had found Codfish Corporation's pre-reorganization problems were attributable to LTFV imports, the Commission could have made a negative determination simply because the imposition of duties would not have been an effective solution to the injured industry's problems.

Such a test would run afoul of 19 U.S.C. § 1673d(b)(1)(B), by allowing the Commission to make a negative determination when material retardation is being caused by LTFV imports. In its determination, the Commission considered the reorganized industry's new characteristics to evaluate future viability. The

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6. The Commission's use of the term "future viability" is somewhat confusing. A determination that an industry is "viable" necessarily means that it is capable of surviving into the future. To the extent that "future viability" is used in this redundant fashion, the court has no objection to it. In this investigation, however, the term "future viability" refers to the viability of Codfish Corporation only in its restructured condition. The court's objection to the Commission's "future viability" analysis specifically refers to the use of the term in this fashion.

Commission, however, failed to consider how the existence of LTFV imports in the marketplace affected the terms upon which the reorganized Codfish Corporation procured fresh financing and signed new contracts. Where the Commission judges "future viability" based upon factors affected by LTFV imports, without adequately considering such effects, its analysis is inherently flawed. If no allowance is made for the continuing effects of LTFV imports, foreign enterprises that force nascent domestic firms into bankruptcy, in certain circumstances, could preclude indefinitely the establishment of such industries. Such a result cannot reasonably be intended by the statute.[7]

The Commission's analysis of "future viability," however, does not compel remand. The Commission did not make a *negative* determination based upon "future viability." The Commission's decision was affirmative, and its analysis is sufficient to support the affirmative determination. All four commissioners concurring in the majority opinion agreed on the analysis of the relevant issue here: Codfish Corporation's viability apart from the effects of LTFV imports (which in this case is essentially "viability

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7. Plaintiffs argue that the Commission's finding of "future viability" is equivalent to a determination that there is a "threat of future injury" to a nascent industry. Plaintiffs' Brief at 12. Plaintiffs contend that this test defies Congressional intent, because Congress specifically chose to incorporate a "threat" analysis only with respect to material injury of an *established* industry. *See* 19 U.S.C. § 1673d(b)(1)(A) (1982 & Supp. III 1985). The court does not find this argument persuasive. The Commission did not find that there was a threat of "future retardation," as plaintiff contends. Rather, the Commission concluded that the reorganized corporation could become established. ITC Determination at 9. In effect, the Commission performed a present material retardation analysis with respect to both the original and restructured entities.

at inception").[8] The only difference of opinion among this group concerned the propriety of "future viability" as a relevant factor in the case.[9] For this reason, the court concludes that the determination was reached in a manner in accordance with law.

II. Substantial Evidence

Plaintiffs also contend that the Commission's final determination is not supported by substantial evidence in the record. "Substantial evidence" refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Electric Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed.Cir.1984) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951)). Again, plaintiffs, do not challenge the portion of the determination regarding causation, but attack only that portion of the determination relating to the viability of Codfish Corporation. Specifically, plaintiffs contend that the Commission relied upon "error-ridden" documents; accepted the company's unrealistic assertions regarding its fixed costs, future sources of cod, and future costs of transportation; and improperly failed

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8. The court does not preclude the possibility that in another case it can be demonstrated that an industry once considered viable is no longer viable because of changing conditions, apart from the effects of LTFV imports. *See supra,* note 6. This is not the case at hand. Plaintiffs have made no showing that there were such unaffected factors.

9. One of the four commissioners in the majority stated that he had considered "viability during the period of the investigation," rather than viability at inception. ITC Determination at 7 n. 16. This commissioner, however, appears to have considered the same factors as the other members of the majority. Even if his reasoning were construed to conflict with the other members, the determination would still be supported by a majority of three commissioners.

to consider the declining market for cod in its break-even analysis. Plaintiffs' Brief at 24-34. In addition, plaintiffs contend that Codfish Corporation was not viable at its inception because it was located in a hot, humid region where drying costs are high, and because it lacked adequate capital, marketing ability, and an economical source of cod. Plaintiffs' Brief at 18-22.

Plaintiffs do not contend that the initial feasibility study considered by the Commission was flawed because of defects in the raw data contained in the report. Rather, plaintiffs challenge the conclusions reached in the document, and express a preference for the findings made in a separate study prepared by the Citicorp Capital Markets Group. Plaintiffs allege that the majority erred by not considering this report and adopting some of its conclusions. In essence, plaintiffs are questioning the thoroughness of the Commission's investigation. *See Kenda Rubber Indus. Co. v. United States,* 10 CIT ____, 630 F.Supp. 354, 356 n. 4 (1986) (contrasting determinations not supported by substantial evidence to those in which the underlying investigation was not legally sufficient).

In response, the government has challenged the relevancy of the Citicorp report, stating that "a study prepared with the benefit of two years experience, and the hindsight which accompanies experience, is hardly a reasonable basis upon which to conclude that Codfish Corporation was not viable at its inception." Defendants' Brief at 20. Plaintiffs dismiss this argument as "crypto-legalese mumbo-jumbo" and maintain that the timing of the report should not affect its probative value on the issue of viability. Plaintiffs' Reply at 13.

Plaintiffs' characterization of defendants' argument is a bit overstated, but not far off the mark. A report analyzing the

progress of an industry over time may contain important insights into how a specific factors affect profitability, provided that these factors are considered in light of the possible effect of LTFV imports. Nevertheless, it is apparent that the Citicorp study *was* considered by the Commission during the preparation of its own break-even analysis. *See* ITC Determination at A-24. Thus, the ITC cannot be said to have conducted an insufficient investigation as a matter of law; the real question at issue is whether, in light of the Citicorp report, the Commission's findings are supported by substantial evidence.

After reviewing the remaining allegations and related material in the record, the court finds that the Commission's determination was supported by substantial evidence. Although plaintiffs assert that Codfish Corporation's working capital was inadequate, they presented no evidence to the Commission regarding the level of working capital necessary for the proper functioning of Codfish Corporation's facility. Plaintiffs offered some evidence on the amount of working capital their own facility requires, but this data was not shown to be applicable to Codfish Corporation. Hearing Transcript at 112. Furthermore, defendant-intervenor presented uncontroverted evidence that Codfish Corporation never lacked working capital with which to purchase inventory. *See* Prehearing Brief of Codfish Corp. at 36.

From the record, it is also clear that the Commission was aware of Codfish Corporation's practice of marketing strictly to wholesale purchasers. ITC Staff Report at A-13. Although plaintiffs argue that this strategy destroyed the company's viability, there is no evidence in the record demonstrating that this was an unreasonable practice, or that it was an inherent feature of the company's business strategy. Plaintiffs cite a passage from the Citicorp study which concluded that the company "did not

establish a coherent marketing strategy," but the study did not conclude that direct access to retailers was essential for viability. It stated that "[a] link to an existing strong wholesaler with a good sales force is the logical route for the company to follow . . . . " *Citicorp Study,* Doc. 2, at 49.

The Commission also rejected plaintiffs' assertion that consumer demand for cod was declining. It specifically noted that the sales volume of codfish was stable at relatively high price levels in 1985, a fact suggesting that demand was not declining for the product. ITC Determination at 12. Plaintiffs' remaining contentions, that sources of codfish were too expensive, and that the Puerto Rican climate is unacceptable for a fish drying operation, were found by the majority not to outweigh advantages that Codfish Corporation gained by locating near a large codfish market with low labor costs. ITC Determination at 7. It is not the function of this court to "re-weigh" factors considered by the Commission; it may only consider whether the Commission's determinations are supported by substantial evidence. *Matsushita Electric,* 750 F.2d at 936. The Commission has clearly satisfied this test.

As indicated, the court has concluded that the Commission's finding regarding initial viability was supported by substantial evidence. The court need not consider whether substantial evidence supported the Commission's determination with respect to the industry's post-bankruptcy cod sources, transportation costs, and re-capitalization because the record contains no evidence to support a decision to set aside the finding of initial viability due to changed circumstances independent of LTFV imports.[10]

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10. As discussed above, the court does not find it necessary to review the (Cont'd)

Appendix C

For the foregoing reasons, the Commission's decision is sustained.

JUDGMENT

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED: that plaintiffs' motion for judgment based upon the administrative record is denied and this action is hereby dismissed.

(Cont'd)
Commission's discussion of "future viability." The court notes, however, that if it had reviewed this aspect of the determination, it would have rejected plaintiffs' arguments. The Commission's "future viability" analysis considered the same factors discussed in its analysis of "viability at inception," and was supported by substantial evidence contained in the Citicorp study and in the Commission's own break-even analysis.

APPENDIX D — DETERMINATION OF THE U.S. INTERNATIONAL TRADE COMMISSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

Investigation No. 731-TA-199 (Final)

CERTAIN DRIED SALTED CODFISH FROM CANADA

Determination

On the basis of the record[1] developed in the subject investigation, the Commission[2] determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)), that the establishment of an industry in the United States is materially retarded by reason of imports from Canada of certain dried heavy salted codfish, provided for in item 111.22 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted this investigation effective January 29, 1985, following a preliminary determination by the Department of Commerce that imports of certain dried heavy salted codfish from Canada were being sold at LTFV within the meaning of section 731 of the Act (19 U.S.C. § 1673). Notice of the institution of the Commission's investigation and of a public hearing to be

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1. The record is defined in sec. 207.2(i) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(i)).

2. Vice Chairman Liebeler dissenting.

held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the *Federal Register* of February 21, 1985 (50 FR 7236). The hearing was held in Washington, DC, on May 20, 1985, and all persons who requested the opportunity were permitted to appear in person or by counsel.

VIEWS OF CHAIRWOMAN PAULA STERN, COMMISSIONER ALFRED E. ECKES, COMMISSIONER SEELEY G. LODWICK, AND COMMISSIONER DAVID B. ROHR

On the basis of the record in investigation No. 731-TA-199 (Final), we determine that the establishment of an industry in the United States is materially retarded by reason of imports of dried heavy salted codfish from Canada, which the Department of Commerce (Commerce) has determined are sold at less than fair value (LTFV). The Commission's investigation reveals suppression and depression of domestic prices, as well as confirmed instances of lost sales and lost revenues due to imports from Canada. The petitioner was unable to market its product competitively and thereby stabilize its production and sales at a level which would allow it to become established.

Like product and the domestic industry[1]

Dried heavy salted codfish is a processed fish made from fresh cod, a groundfish caught on or near the sea bottom in cold or temperate waters, such as the North Atlantic and the northern

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1. Vice Chairman Liebeler joins in this discussion of the like product and domestic industry.

Pacific Ocean.[2] In our preliminary determination[3] regarding this product, we concluded that the like product is dried heavy salted codfish, and the domestic industry consists of the operations of petitioner Codfish Corporation, the only known processor of dried heavy salted codfish in the United States. No party has raised any arguments in favor of a different determination, and the information in the record does not suggest a different conclusion. Therefore, we adopt the definitions of like product and domestic industry reached in our preliminary determination.[4] [5]

Material retardation of the establishment of a domestic industry

Section 735 of the Tariff Act of 1930 requires that the Commission make a final determination of whether—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

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2. Report of the Commission (Report) at A-2-A-3.

3. Certain Dried Salted Codfish from Canada, Inv. No. 731-TA-199 (Preliminary), USITC Pub. 1571 (1984) (hereinafter Preliminary Determination).

4. Preliminary Determination at 3-5.

5. Because of the manner in which petitioner maintains its records, some of the information concerning the domestic industry includes data relating to production of other dried salted fish such as pollock or hake. To the extent possible, we have considered only data related to petitioner's operations producing dried heavy salted codfish.

by reason of LTFV imports.[6]

The petitioner in this investigation alleged that the establishment of a domestic industry is materially retarded by reason of LTFV imports of dried heavy salted codfish from Canada. Prior Commission determinations regarding the issue of material retardation establish that: (1) application of the material retardation standard is not limited to industries that have not yet begun production, but extends as well to new facilities that have initiated production but have not yet stabilized their operations; (2) because the attempt to establish a new industry is inherently unique, determination of whether the establishment of an industry is materially retarded is to be made on a case-by-case basis; and (3) in instances involving an industry that has not yet undertaken production, there must be a sufficient indication that the industry has made a "substantial commitment" to commence production.[7]

A significant question with regard to the issue of material retardation in this investigation is whether it is appropriate to view the case as one of material injury or the threat thereof, rather

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6. 19 U.S.C. § 1673d.

7. *See, e.g.*, Thin Sheet Glass from Switzerland, Belgium, and the Federal Republic of Germany, Inv. Nos. 731-TA-127, 128, and 129 (Preliminary), USITC Pub. No. 1376 (1983); Certain Commuter Airplanes from France and Italy, Inv. Nos. 701-TA-174 and 175 (Preliminary), USITC Pub. No. 1296 (1982); Salmon Gill Fish Netting of Manmade Fibers from Japan, Inv. No. 751-TA-5, USITC Pub. No. 1234 (1982).

than material retardation. Petitioner commenced production in late 1982, and produced dried heavy salted codfish on a commercial basis through November 1984, when it shut down its operations.[8] However, during the entire period of its operations, the petitioner was unable to stabilize production at a level which even approached a reasonable break-even point. We determine that the domestic industry in this investigation, which consists of petitioner's operations in Puerto Rico, was never "established," and that therefore material retardation is the applicable standard in this investigation.

In the preliminary investigation, the Commission phrased the question of material retardation as "whether the level of activities of Codfish Corporation reflect merely the normal start-up conditions of a company entering an admittedly difficult market or whether the performance is worse than what could reasonably be expected and thus be deemed materially retarded."[9] We used this approach in analyzing the issue of material retardation in this final investigation. The difficulty is determining what level of performance "could reasonably be expected." The market and feasibility study prepared by petitioner and FOMENTO[10] at the inception of its business operations provides us with a benchmark of expected performance against which to measure the actual

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8. Petitioner plans to reopen its plant in summer 1985, pending the conclusion of negotiations with the FDIC concerning loans from the now-bankrupt Girod Trust, and the receipt of additional capital financing from the Government Development Bank of Puerto Rico. *See* Report at A-5.

9. Preliminary Determination at 6-7.

10. Project Description for the Establishment of the Portuguese-Puerto Rican Codfish Corporation, reprinted at Report, Appendix C. FOMENTO is the Spanish acronym for the Government of Puerto Rico Economic Development Administration.

performance of petitioner.[11]

There does not appear to be any serious dispute that Codfish Corporation has not operated successfully.[12] Domestic shipments of dried heavy salted codfish during all periods of petitioner's operations were substantially below its projected break-even quantities.[13] Even during its best period, January-November 1984, petitioner's capacity utilization rate fell well below its projected break-even level.[14] Employment declined during petitioner's period of operations, and since November 30, 1984, all production and related workers have been on temporary layoff.[15] Financial information obtained from Codfish Corporation indicates that it it lost money during its entire period of operations. The company has a relatively large current debt, as well as long-term debt related

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11. We note that such feasibility studies are based on assumptions about the future and that it is not unexpected that petitioner's actual performance might be below that projected. A feasibility study such as that presented in this investigation must be analyzed in light of actual conditions in order to determine what performance could reasonably be expected.

12. Due to the relatively short time Codfish Corporation has been in existence and the manner in which it maintains its data, we do not have the same data available concerning the condition of the domestic industry as in a more typical investigation.

13. Report at A-12. Because there is only one company in the domestic industry, almost all information concerning its operations is business confidential and thus can be discussed only in general terms.

14. Report at A-12. *See Id.* at A-23 for a discussion of petitioner's initial market study and projected sales and production volumes. Further break-even analyses of petitioner's operations appear at pages A-24-A-26 of the Report.

15. Id. at A-13.

to investment in physical facilities. Petitioner has never achieved a level of operation which even approaches a break-even level. Thus, the information on the record indicates that Codfish Corporation's performance to date is substantially poorer than that which could reasonably have been expected.

A principal focus of the Canadian producers' and importers' argument has been that petitioner's operation in Puerto Rico is inherently unviable, and could never operate profitably, regardless of LTFV imports.[16] They allege that the hot, humid climate of Puerto Rico makes it entirely unsuitable for a fish drying operation.[17] Petitioner responds by arguing that its plant is a feasible operation, due to lower labor costs and certain marketing and distribution advantages, which outweigh its relatively high energy costs. Our examination of the information in the record indicates that the major component of petitioner's costs of production is raw material costs.[18] The disadvantages of petitioner vis-a-vis Canadian producers' costs in certain areas are balanced

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16. Commissioner Eckes focused on the viability of the domestic industry during the period of investigation in making his determination of material retardation. He does not believe the petitioner must prove future viability to obtain relief from unfair imports.

17. Fish drying operations require the passage of constant streams of warm, dry air over the fish for a period of up to 5 days. Petitioner's entire factory is air conditioned, to provide an appropriate temperature to prevent spoilage of the fish during initial handling and processing. By contrast, the cooler, dryer climate of Canada means that air conditioning of plants is not required. In addition, the Canadian producers close their plants during the warmest months of July and August. It must be noted, however, that petitioner's plant is acknowledged to be a state-of-the-art fish drying plant.

18. Report at A-15.

against advantages enjoyed by petitioner in other areas.

The viability of the nascent domestic industry is a relevant consideration in deciding the issue of material retardation in this investigation. The elements of viability which are important in this investigation are the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price which is competitive with fairly traded imports.[19] On the basis of our analysis of the above-mentioned marketing and feasibility study, the initial business plan of the petitioner appears reasonably calculated and could have succeeded.

The Canadian producers and importers argue that, given its current status and the current market for dried heavy salted codfish, petitioner will never be able to reopen its plant and operate it as a successful business.[20] The future viability of petitioner's business operations is a relevant issue in determining whether the establishment of a domestic industry is being materially retarded.[21] Codfish Corporation has provided us with information concerning its plans to reopen its plant in Puerto Rico. Petitioner has received approval of a $2 million line of credit from the Government Development Bank, to provide necessary additional capital.[22]

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19. *See* Salmon Gill Fish Netting of Manmade Fibers from Japan, Inv. No. 751-TA-5, USITC Pub. 1234 (1982).

20. Commissioner Lodwick focused his attention in this investigation primarily on the viability of the domestic industry at its inception in making his determination. However, he also believes that the following discussion of Codfish Corporation's future viability is relevant, as it strengthens his conclusions concerning the viability of the domestic industry.

21. *See* note 16, *supra.*

22. Report at A-5.

Appendix D

Codfish Corporation has also recently signed an agreement with Packers Provision, the largest meat distributor in Puerto Rico, pursuant to which Packers Provision will handle marketing and distribution of petitioner's product through its existing channels, as well as develop new markets for the product.[23] In addition, petitioner has made arrangements to procure raw material (wet salted codfish) from Alaska and New England at competitive world market prices.[24]

Based on this information concerning petitioner's plans, the Commission has prepared a break-even analysis of petitioner's operations, using information collected from independent sources where possible as well as information provided by petitioner. We are persuaded that petitioner could be able to recommence operations, given fairly traded competition from imports, and stabilize its production and sales at a level which will allow it to become established.[25]

Causation

Petitioner's argument regarding causation in this investigation rests primarily on its contention that the price of Canadian imports has been continually lowered in an effort to prevent its

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23. *Id.* at A-7; Transcript of Hearing (Tr.) at 38-41, 61.

24. Report at A-26-A-27.

25. We do not believe a negative determination is warranted simply because the imposition of antidumping duties may not be a complete solution to petitioner's difficulties. The antidumping law is not intended to be punitive; neither is it intended to protect domestic industries from fair competitive forces. It is intended to allow domestic industries the opportunity to compete free from injury caused by unfairly traded imports.

entrance into the market.[26] Thus, pricing data are critical in our determination.

A new entrant into the market must consider what sales volume, at a certain price, is necessary for the business venture to succeed. Petitioner's initial business plans called for prices to be established somewhat below the then-current prices for imports of dried heavy salted codfish from Canada. As a new entrant to the market, particularly when, as is the case here, the product is sold largely on the basis of price, it would be reasonable for petitioner, whose product was as yet unproven, to seek to undersell the dominant Canadian imports in order to capture a share of the market.

The pricing data gathered in this investigation indicate that, at the wholesale level,[27] prices of both imports and the domestic

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26. We note that some attention has been given by all the parties to the question of whether Canadian producers commenced dumping in order to prevent petitioner from establishing the domestic industry. Predatory dumping is not at issue in this investigation, because the Canadian producers' intent is irrelevant to the Commission's determination. Commerce has determined that imports of dried heavy salted codfish from Canada have been sold at LTFV in the United States. The Commission must therefore determine whether the establishment of the domestic industry is materially retarded by reason of those LTFV imports, regardless of whether they were intended to have that effect.

27. The wholesale level is the most relevant for purposes of comparisons of import and domestic prices in the U.S. market for dried heavy salted codfish. Sales to a relatively small number of large wholesale distributors in Puerto Rico are the first and most critical level of competition between Canadian imports of dried heavy salted codfish and the domestic product. Prices to these wholesalers determine not only profit (or loss) to the importer and the domestic producer, but also set the competitive price advantage or disadvantage of these

(Cont'd)

product declined throughout the period under investigation until the fourth quarter of 1984.[28] Moreover, imports of Canadian dried heavy salted codfish in the most popular product categories, semi-dry cure heavy salted codfish from Newfoundland and ordinary cure heavy salted codfish from Nova Scotia and other non-Newfoundland sources, undersold the domestic product during most of the quarters for which comparisons are possible until the fourth quarter of 1984.[29] Thus, margins of underselling at the wholesale level characterize prices of the bulk of imports of dried heavy salted codfish from Canada.[30]

Canadian imports accounted for the vast majority of domestic consumption during the entire period under investigation.[31] These imports came from a number of Canadian producers, and were

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(Cont'd)
wholesalers in resales to sub-wholesalers, supermarkets and cash-and-carry chains, and independent retail grocers. Absent an integrated island-wide distribution capability in-house, the domestic producer, of necessity, competed with imports from Canada for sales to these large wholesale distributors.

28. Report at A-30-A-34.

29. *Id.* Semi-dry cure accounts for the majority of the dried heavy salted codfish imported from Newfoundland; virtually all imports from Nova Scotia are of ordinary cure.

30. Report at A-30-A-34.

31. Because imports of dried heavy salted codfish enter the United States in a "basket" tariff category, including different types of both wet and dried heavy salted fish, the Commission has calculated import figures for dried heavy salted codfish based on the questionnaire responses of importers estimated to have accounted for over 90 percent of all U.S. imports from Canada in 1984. Report at A-29. Apparent consumption was estimated to be the sum of Canadian exports to the United States and Codfish Corporation's domestic shipments, since imports from third countries were apparently minimal until late 1984. *Id.* at A-28-A-29.

imported into the United States by several Puerto Rican importers, as well as through brokers in the United States and Canada.[32] The result of this pervasive pattern of underselling by these dominant imports was suppression and depression of domestic prices. The result of declining prices in the U.S. market was the inability of petitioner to market its product competitively at the wholesale level at a price which would allow it to recoup its costs and make a profit.[33]

In addition, we note that the price of imports from Canada increased at the wholesale level across the board during the fourth quarter of 1984.[34] This increase occurred even before the imposition of a bonding requirement following the preliminary affirmative determination of Commerce. At that time, the market presence of Codfish Corporation was minimal, as it had sold off most of its remaining product preparatory to shutting down its operation in November 1984.

We note, moreover, that first quarter 1985 sales, at higher prices, appear to have remained at levels comparable to those achieved in previous years, suggesting that the higher prices did not significantly affect sales.[35] This suggests a certain degree of

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32. *Id.* at A-6-A-8.

33. Moreover, when the domestic producer, unable to market its product competitively at the wholesale level, attempted to sell to the sub-wholesale/retail market, offering the same prices, it was undersold at the low end of the import price range by semi-dry Canadian dried heavy salted codfish. Report at A-34-A-36.

34. *Id.* at A-30-A-34.

35. *See* Prehearing Brief of Codfish Corporation at Attachment E.

inelasticity of demand, which contradicts the Canadian producers' and importers' argument that prices declined due to decreasing demand in the Puerto Rican market during this time period. Had the LTFV imports from Canada not drawn the U.S. market price of dried heavy salted codfish downward during the period under investigation, petitioner would have been able to market its product at prices which would have allowed it to establish itself in the marketplace. Furthermore, the information in the record concerning petitioner's plans for sourcing wet salted codfish indicates that Codfish Corporation should now be able to price its product at levels which would allow it to establish itself in the marketplace.

In addition to our analysis of the pricing data in this investigation, we note that the Commission was able to confirm virtually all allegations of lost sales and lost revenues by Codfish Corporation to imports from Canada.[36] [37] In most of these cases, the purchasers indicated that the quality of petitioner's product was adequate, and that they would be willing to buy petitioner's product, provided the price was competitive.[38]

Two importers of Canadian dried heavy salted codfish argued in their briefs and at the hearing that the Commission should reach a negative determination because dumping by the Canadians is the result of market forces (i.e., a declining world market price

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36. Report at A-41-A-44.

37. Chairwoman Stern notes that these lost sales and lost revenue allegations represented only a small percentage of domestic shipments and net sales for the period January 1, 1983 through November 1984.

38. Report at A-41-A-44.

for dried heavy salted codfish, and declining demand in the Puerto Rican market) and not a response to petitioner's attempt to commence production. In addition, the Canadian producers and importers argued that international market conditions determine the price of dried heavy salted codfish in the U.S. market, and that if antidumping duties were imposed, the Canadian imports in the U.S. market would simply be replaced by low-priced imports from Norway, Iceland, or some other third country source.[38]

These arguments are not supported by information on the record. Such replacement would require that these countries divert exports from current markets to the U.S. market. Information in the record suggests that there is a limited amount of dried heavy salted codfish available from third country sources which can be directed to the U.S. market.[39]

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38. We note that, according to information submitted by the Canadian producers, during 1983 and 1984, Canadian export prices to the United States were higher than to the rest of the world. However, there does not appear to have been a significant increase in third country imports into the U.S. market until the most recent period. See Report at A-28.

39. Currently, the cod catch is reportedly down 30 percent from prior years, and this decline has been predicted to continue. Telephone notes of Staff Economist. Moreover, the proportion of the catch being processed into dried heavy salted codfish also appears to be declining. Tr. at 135-36. Information on the record indicates that if the short catch of cod continues, Norway, the largest producer of dried heavy salted codfish in the world, will not be able to supply the Puerto Rican market appreciably. Norway has a more profitable alternative market for fresh cod in the European Community, in addition to its longstanding barter arrangement with Brazil, the world's largest consumer of dried heavy salted codfish, to exchange dried heavy salted fish for coffee. Report at A-15; Telephone notes of Staff Economist; Letter from O. Bjorge, Norwegian fish producer/exporter, Exhibit 1 to Hearing Testimony of Paolo da Cunha.

Appendix D

Moreover, the fact that Canadian imports might be forced out of the market and be replaced by low-priced third country imports should an antidumping duty order be imposed is irrelevant to the determination the Commission must make, that is, whether LTFV Canadian imports materially retard the establishment of the domestic industry. A mere possibility that the domestic industry may not be able to compete with third country imports at some unknown time in the future, whether the imports are fairly or unfairly traded, does not affect our consideration of the effect of imports from Canada which are being sold at LTFV.

Thus, we conclude that the establishment of an industry in the United States is materially retarded by imports of dried heavy salted codfish from Canada which are sold at LTFV.

VIEWS OF VICE CHAIRMAN LIEBELER

The question before the Commission in Inv. 731-TA-199 is one of material retardation. The petitioner has not succeeded in establishing a domestic dried heavy salted codfish industry. Has the establishment of a domestic industry been materially retarded by reason of imports of Canadian dried salted codfish which have been sold at less than fair value?

If the petitioner would not have been able to establish a viable industry even had the sales of Canadian dried heavy salted codfish not occurred at less than fair value, then the establishment of such an industry has not been materially retarded by the less than fair value sales. The critical question, therefore, is, would there now be a viable domestic industry, but for these sales at a weighted average 16.3% below fair value?

I am convinced that the failure to establish a domestic industry cannot be laid at the door of these LTFV sales. The drying and curing necessary to produce this product requires hot-dry air, with

the emphasis on the dry. The world's leading producer of this product is Norway, followed by Canada. In addition, Portugal, Iceland and the United Kingdom are also producers. Consumers, on the other hand, are located in Latin America (especially in Brazil), Portugal, Italy, Greece, and Spain. It is not mere chance that has caused a product that is consumed in tropical regions to be produced at northern latitudes. It is in the nature of the technology and costs of the industry.

Because the drying process requires removing moisture from the fish, the lower the moisture content of the ambiant surroundings, the cheaper and easier the process. Warm air of a given humidity will contain more mositure than cold air. Therefore, it is easier to extract moisture from fish in a colder region. The Canadians and Norwegians have a cost advantage, in spite of their higher labor costs, in drying and curing the fish because they need not spend as much on energy in order to carry out the process.

In addition to the lower energy costs, there are two other important reasons why the drying is done in Norway and Canada. The fish are caught at northern latitudes. The drying and curing process both eliminates weight and prevents spoilage. The closer the drying is done to the place the fish are caught, the less chance of spoilage and the lower the shipping cost.

These arguments are persuasive, and are made compelling by the fact that although the Puerto Rican market is a small segment of the world market, none of the low-wage South American countries have a significant dried salted codfish industry. It is inconceivable that if this industry were viable in Puerto Rico it would not be even more profitable in Brazil. The failure of the market to induce other firms to enter in countries with larger

markets, lower wages and similar climates convinces me that this is not a viable United States industry, capable of competing against fairly traded imports.

Nor is it likely to become competitive due to a rise in demand. The market for this product is limited to Peurto Rico and other ethnic markets in several major cities on the mainland. This is an ethnic food, consumed primarily as a low cost source of protein. As incomes rise, purchases of this product fall. The petitioner has entered a declining industry at an uneconomic location.

In conclusion, therefore, I determine that the domestic dried salted codfish industry has not been materially retarded by less than fair value sales of Canadian dried salted codfish.

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-853

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

BMT COMMODITY CORP. AND
DELCA DISTRIBUTORS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States International Trade Commission's determination that imports of dried salted codfish at less than fair value had materially retarded the establishment of an industry in the United States was in accordance with law.

2. Whether that determination was supported by substantial evidence.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

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DELCA DISTRIBUTORS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 852 F.2d 1285. The opinions of the United States Court of International Trade (Pet. App. 3a-24a) are reported at 674 F. Supp. 868 and 667 F. Supp. 880. The opinion of the United States International Trade Commission (Pet. App. 25a-41a) is unofficially reported at USITC Pub. 1711.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1988. The petition for a writ of certiorari was filed on November 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Tariff Act of 1930, 19 U.S.C. 1671 *et seq.*, provides for the imposition of antidumping duties when (1) the Department of Commerce determines that a certain class or kind of foreign merchandise is being sold in the United States at less than fair value (LTFV), and (2) the United States International Trade Commission (the Commission) determines that the establishment of an industry in the United States is being materially retarded by those imports. 19 U.S.C. 1673.[1]

"Interested parties" (19 U.S.C. 1677(9)) who participate in a proceeding before the Commission may seek review of its final determination in the United States Court of International Trade (19 U.S.C. 1516a(a)(2)), and may appeal that court's decision to the United States Court of Appeals for the Federal Circuit (28 U.S.C. 1295(a)(5) (1982 & Supp. IV 1986)). A final determination by the Commission must be affirmed unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B); *Atlantic Sugar, Ltd.* v. *United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984).

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[1] Section 1673 provides for the imposition of an additional duty:

> If –
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that –
>
> (A) an industry in the United States –
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise * * *.

2. In 1984, Codfish Corporation (Codfish) filed a petition alleging that dried salted codfish were being imported into the United States from Canada at less than fair value. Petitioners BMT Commodity Corp. and Delca Distributors, Inc., are importers of such codfish. After conducting the preliminary and final investigations required by the statute,[2] the Commission determined, by a vote of four to one, that the establishment of an industry in the United States was being materially retarded by reason of LTFV imports of dried heavy salted codfish from Canada. Pet. App. 25a-41a.

At the outset, the majority found that the relevant "domestic industry" consisted exclusively of Codfish's operations in Puerto Rico. Since this "industry" had never been "established" within the meaning of 19 U.S.C. 1673d, the majority continued, the statute required the Commission to determine whether the establishment of this industry was being materially retarded (Pet. App. 29a). The majority framed the precise question before it as follows (*ibid.*):

> whether the level of activities of Codfish Corporation reflect merely the normal start-up conditions of a company entering an admittedly difficult market or

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[2] 19 U.S.C. 1673a, 1673d. During its final investigation, the Commission sent questionnaires to Codfish and to the known importers of dried salted codfish and purchasers of dried salted codfish in the domestic market. In addition, members of the Commission's staff visited Codfish's facilities, conducted interviews with purchasers in the domestic market, received information from Canadian producers of dried salted codfish, and collected information from other public and private sources. A public hearing was held before the Commission, and all persons who requested the opportunity were permitted to appear in person or through counsel. Subsequently, a staff report discussing the data gathered during the course of the final investigation was submitted to the Commission.

> whether the performance is worse than what could reasonably be expected and thus be deemed materially retarded.

Applying this standard, the majority referred to a marketing and feasibility study prepared by Codfish and the Government of Puerto Rico Economic Development Administration (FOMENTO) at the inception of Codfish's operations. The majority described that study as "a benchmark of expected performance" against which it could measure Codfish's actual performance (Pet. App. 29a-30a). Noting that there was no serious dispute that Codfish had not operated successfully, the majority concluded that the record "indicates that Codfish Corporation's performance to date is substantially poorer than that which could reasonably have been expected" (*id.* at 31a).

The Commission then addressed the contention advanced by importers and Canadian producers, including petitioners, that Codfish's operation was "inherently unviable, and could never operate profitably, regardless of LTFV imports" (Pet. App. 31a). The Commission acknowledged that Codfish's viability was relevant to the issue of material retardation, and outlined the material "elements of viability" as (*id.* at 32a):

> the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price which is competitive with fairly traded imports.

Again referring to Codfish's marketing and feasibility study, the majority rejected petitioners' position on viability, finding that "the initial business plan of [Codfish] appears reasonably calculated and could have succeeded" (*ibid.*).

The majority next considered petitioners' argument that Codfish would not be able to operate as a viable business

in the future. The text of the majority opinion described this issue of future viability as relevant. Pet. App. 32a. However, citing a line of credit that Codfish had recently been granted and arrangements the company had made to purchase fish and market its products, the majority found that "given fairly traded competition from imports" Codfish could be able to "stabilize its production and sales at a level which will allow it to become established." *Id.* at 33a.

In brief footnotes, the opinion related the individual views of two members of the Commission with respect to Codfish's viability. Commissioner Eckes was described as having "focused on the viability of the domestic industry [Codfish] during the period of the investigation" and as believing that Codfish did not have to prove "future viability to obtain relief from unfair imports." Pet. App. 31a n.16. A second footnote reported that Commissioner Lodwick had focused "primarily on the viability of the domestic industry at its inception," but believed that the discussion of future viability in the text was relevant, "as it strengthens his conclusions concerning the viability of the domestic industry" (*id.* at 32a n.20).

Finally, the majority found that LTFV imports from Canada had resulted in the inability of Codfish to market its product competitively and profitably, and concluded that the establishment of an industry in the United States had been materially retarded by reason of those imports (Pet. App. 39a).

Vice Chairman Liebeler dissented (Pet. App. 39a-41a). In her view, Codfish's poor results were not attributable to LTFV imports, but rather to Puerto Rico's warm, moist climate, which she believed was unsuitable for a fish drying operation. She concluded that the establishment of the

domestic industry had not been materially retarded by LTFV imports. *Ibid.*

3. Petitioners filed an action for review in the United States Court of International Trade (CIT). That court affirmed the Commission's determination (Pet. App. 11a-24a).

The court rejected petitioners' argument that a majority of the commissioners "did not adopt 'a single, identifiable standard of law' on the issue of viability" (Pet. App. 15a (quoting Pet. CIT Reply Br. 7)). The CIT noted that none of the parties challenged "the Commission's conclusion that Codfish Corporation's viability at inception is a relevant consideration in this case" (Pet. App. 16a), and the court upheld the Commission's finding that Codfish had been viable at that point (*id.* at 16a-17a & n.5). The court expressed "some reservations" about the Commission's analysis of "future viability" (*id.* at 17a), explaining that such an approach could lead to a decision not to impose anti-dumping duties even if an industry's failure to become established were attributable to LTFV imports—a result that the court considered inconsistent with the statute (*id.* at 18a-19a). However, the CIT found that its concern with the use of a future viability standard did not justify a remand, since the Commission had not ruled against the domestic industry on the basis of future viability (*id.* at 19a). The court found that "[a]ll four commissioners concurring in the majority opinion agreed on the analysis of the relevant issue here: Codfish Corporation's viability apart from the effects of LTFV imports" and concluded that the Commission's determination was "reached in a manner in accordance with law." *Id.* at 19a-20a.

The CIT also found that the Commission's determination that Codfish was viable at its inception was supported by substantial evidence. The court determined that the

Commission had properly considered both the initial feasibility study to which the Commission's majority opinion had referred and a study, upon which petitioners relied, by the Citicorp Capital Markets Group (Pet. App. 21a). The court also analyzed and rejected petitioners' claims that deficiencies in working capital, marketing, demand, and climate made Codfish a nonviable business (*id.* at 22a-23a). The CIT concluded (*id.* at 23a):

> It is not the function of this court to "re-weigh" factors considered by the Commission; it may only consider whether the Commission's determinations are supported by substantial evidence. * * * The Commission has clearly satisfied that test.

Petitioners sought rehearing. Their motion was denied. Pet. App. 3a-10a.

4. The court of appeals affirmed on the basis of the CIT's opinion (Pet. App. 1a-2a).

ARGUMENT

The CIT's decision, which the court of appeals adopted, is correct. Moreover, the questions raised in the petition are fact-bound and have no general importance. Review by this Court is not warranted.

1. Petitioners' principal contention is that the CIT supplied a rationale for the Commission's determination concerning Codfish's viability that was not articulated by the Commission itself (Pet. 10-14). This argument has no merit, as even cursory review of the Commission's opinion demonstrates.

The majority's opinion leaves no doubt as to the legal standard applied to Codfish's viability. The opinion described the relevant "elements of viability" as "the ability to produce a marketable product, which is qualitatively acceptable to purchasers, and which can be sold at a price

which is competitive with fairly traded imports" (Pet. App. 32a). Its decisive finding on this issue was equally straightforward. Relying on a marketing and feasibility study "prepared * * * at the inception of [Codfish's] business operations" (*id.* at 29a), the Commission concluded that "the initial business plan of [Codfish] appears reasonably calculated and could have succeeded" (*id.* at 32a).

The CIT correctly described this finding as referring to "the viability of Codfish Corporation from the time of its inception" (Pet. App. 16a n.4). No other conclusion would have been consistent with the terms of the finding and the evidence on which it rested. Though described as an inference (*ibid.*), this reading of the Commission's opinion is inescapable.[3]

Petitioners' argument that the Commission majority "did not adopt a common legal standard" (Pet. 11) is groundless. Petitioners argued to the Commission that the establishment of the domestic industry had not been materially retarded because, regardless of Codfish's viability at the outset, the company would not be able to operate as a successful business even if antidumping duties were imposed on LTFV imports (Pet. App. 32a). The

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[3] It is also noteworthy that the issue of Codfish's viability was subsidiary to more fundamental standards with which petitioners take no issue in this Court. There is no dispute, therefore, that the Commission properly viewed the dispositive issue as whether the establishment of the domestic industry had been "materially retarded" (19 U.S.C. 1673(2)(B)), and correctly framed the issue presented by this standard under the circumstances of this case, which was "whether [Codfish's] performance is worse that what could reasonably be expected and thus * * * materially retarded" (Pet. App. 29a).

The law does not require the members of the Commission to agree on all particulars of the analysis leading to a result which is in accordance with the statute. See *Copperweld Corp.* v. *United States*, 682 F. Supp. 552, 559-560, 567-568 (Ct. Int'l Trade 1988).

members of the majority unanimously rejected that contention, differing only on the precise terms of their disagreement with petitioners' position. In text, the majority opinion stated that this argument was "relevant," but found that Codfish would be viable in the future (*id.* at 32a). One member of the Commission, who had focused on Codfish's viability during the period of the Commission's investigation, expressed the view that Codfish should not even have to prove "future viability" to obtain relief (*id.* at 31a). Another Commissioner, who had focused on the company's viability at inception, added that the rejection of petitioners' argument regarding future viability "strengthen[ed] his conclusions concerning the viability of the domestic industry" (*id.* at 32a n.20).[4] Regardless of these individual views, all members of the majority joined in rejecting petitioners' challenge to Codfish's viability at any point as a defense to a finding of material retardation.

The CIT expressed reservations as to whether the Commission's consideration of future viability was more favorable to petitioners than the terms of the statute permitted. However, the court found the point immaterial in view of the fact that the Commission had rejected petitioners' position in any event (Pet. App. 18a-19a). The court noted, moreover, that the Commission's factual finding that Codfish was viable in the future was supported by substantial evidence (*id.* at 23a-24a). Against this background, a remand to clarify the Commission's determination on the issue of viability would have been a meaningless act, as the court correctly concluded (*id.* at 19a-20a).

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[4] There is nothing talismanic about the phrases "viability at inception," "future viability," and "inherent viability." They are not terms of art in this area of the law, and were used in this case only as shorthand references to arguments raised by its facts. These terms are not deserving of the emphasis petitioners would give them. See Pet. 12-13.

In short, the only divergence among the views expressed by members of the Commission and the CIT concerned the validity of an argument, introduced into the case by petitioners, which at least three members of the majority found to be unsupported by the facts and a fourth found legally irrelevant. The CIT would also have rejected it on factual grounds, but went farther and expressed doubt as to its legal correctness. The CIT properly refused to vacate the Commission's determination under these circumstances, and this type of quibble with the terms of an agency's determination does not warrant review in this Court in any event.

2. Petitioners challenge the sufficiency of the evidence supporting the Commission's factual finding that Codfish was viable (Pet. 14-18). However, the Court does not grant certiorari "to review evidence and discuss specific facts." *United States* v. *Johnston,* 268 U.S. 220, 227 (1925). See *NLRB* v. *Hendricks County Rural Elec. Membership Corp.,* 454 U.S. 170, 176 n.8 (1981). More particularly, the responsibility for reviewing a record to determine whether an agency's findings are supported by substantial evidence is primarily for the courts Congress has designated to conduct that review, here the CIT and the Federal Circuit. *Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951). This Court intervenes in such a case only in "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.,* 340 U.S. at 491. This is clearly not such a case.

The Tariff Act requires the CIT to apply the "substantial evidence" test to Commission findings. 19 U.S.C. 1516a(b)(1)(B). Both the CIT and the court of appeals, through its adoption of the CIT's opinion, correctly ar-

ticulated that standard with reference to a decision of this Court (Pet. App. 20a):

> "Substantial evidence" refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Electric Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951)).

Nothing in the petition suggests that the lower courts erred in the application of this standard, let alone in a manner sufficiently egregious to warrant this Court's attention. Though petitioners now complain that an error in the initial study of Codfish's viability is "fatal" to the Commission's conclusion (Pet. 15), they never called the CIT's attention to that alleged error, instead raising the point for the first time on appeal. Petitioners' default alone warrants denial of review on this issue. See *Singleton* v. *Wulff,* 428 U.S. 106, 120 (1976). In any event, there is no reason to believe that the Commission's determination was dependent on the figures referred to by petitioners, which relate only to Codfish's profitability during the first year of its operations, since the Commission described the feasibility study only as a "benchmark" and carefully qualified its reliance on the study's particulars (Pet. App. 29a-30a & n.11). Finally, the conclusion that petitioners would have this Court draw from the discrepancy in the study—that Codfish's promoters expected that the company would "be a losing venture from the start" (Pet. 15) but went ahead with the business anyway—is at best farfetched.

Petitioners' suggestion that the Commission gave too much weight to Codfish's initial feasibility study and too little to the Citicorp study (Pet. 16-18) is exactly the type of issue on which a reviewing court should not second-

guess an administrative agency empowered by Congress to adjudicate issues of fact. The CIT rejected petitioners' contention that the Commission had ignored the Citicorp study (Pet. App. 22a), and properly refused to go beyond satisfying itself that the record supported the Commission's conclusions. Petitioners' argument on the significance to be given to particular evidence in the record is undeserving of further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699 00075